

Restitution in Federal Criminal Cases: A Sketch

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Summary

Federal courts may not order a defendant to pay restitution to the victims of his or her crimes unless authorized by statute to do so. Several statutes supply such authorization. For instance, federal courts are statutorily required to order victim restitution when sentencing a defendant either for an offense against property, including fraud or deceit, proscribed in Title 18 of the *United States Code* or for a crime of violence. The obligation exists even if the defendant is indigent, and restitution must take the form of in-kind, lump sum, or installment payments. Federal courts are permitted, but not required, to order victim restitution when sentencing a defendant for any offense proscribed in Title 18 for which restitution is not required. Federal courts are permitted to order victim restitution when sentencing a defendant for various controlled substance and aviation safety offenses. In addition, a federal court may order restitution pursuant to a plea bargain or as a condition of probation or supervised release.

As a general rule, restitution is available only to victims who have suffered a physical injury or financial loss as a direct and proximate consequence of the crime of conviction, and only to the extent of their losses. Several provisions governing restitution following conviction for particular crimes permit awards for types of losses that might not otherwise be permitted under the general restitution provisions. For example, the Identity Theft Enforcement and Restitution Act of 2008 (18 U.S.C. 3663(b)(6)) authorizes restitution orders to compensate victims for the cost of remediating the intended or actual harm caused by certain identity theft violations. The courts are divided over the extent to which a defendant convicted of possession of child pornography may be ordered to make restitution to the child depicted in the material.

When restitution is authorized, a probation officer gathers information from victims, the government, the defendant, and other sources for a report to the court. The parties receive copies of the report and may contest its recommendations. The court has considerable discretion as to the manner and scheduling of restitution payments, but the authority may not be delegated to probation or prison officials. Furthermore, the order must provide for full restitution for all victims unless the sheer number of victims or the complications of a given case preclude such an order.

Under the abatement doctrine, when a defendant dies before his or her appeal has become final, the law treats the indictment and conviction as though they had never happened. The conviction is vacated and the indictment dismissed. The courts do not agree on whether the doctrine also reaches unfulfilled obligations under a restitution order.

This report is an abridged version of CRS Report RL34138, *Restitution in Federal Criminal Cases*—without footnotes, citations to most authorities, or appendixes found in the longer report. Related reports include CRS Report RL33679, *Crime Victims' Rights Act: A Summary and Legal Analysis of 18 U.S.C. §3771*, available in abridged form as CRS Report RS22518, *Crime Victims' Rights Act: A Sketch of 18 U.S.C. §3771*.

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Background

Federal courts may not order a defendant to pay restitution to the victims of his or her crimes unless authorized to do so. Two general statutes authorize restitution. One, 18 U.S.C. 3663, permits it for certain crimes. The second, 18 U.S.C. 3663A, requires it for other crimes. In addition, several individual restitution statutes authorize awards for particular offenses. In addition, federal courts may order restitution pursuant to a plea agreement or as a condition of probation or supervised release. Section 3664 supplies the procedure under which the restitution orders are imposed.

In the case of mandatory restitution, federal courts must order victim restitution when sentencing a defendant for a felony that constitutes either (1) a crime of violence; (2) an offense against property, including fraud or deceit proscribed in Title 18; (3) maintaining a drug-involved premise; (4) animal enterprise terrorism; (5) failure to provide child support; (6) human trafficking; (7) sexual abuse; (8) child pornography; (9) stalking or domestic violence; (10) copyright infringement; (11) telemarketing fraud; or (12) amphetamine or methamphetamine offenses.

Victims

The various federal restitution statutes address three questions: Who qualifies as a victim? What crimes trigger restitution authority? What type of injuries or losses does restitution cover? As originally cast, §3663 authorized restitution for “any victim” of any crime proscribed in title 18 of the *United States Code*, but did not define the term “victim.” The Supreme Court read the statute narrowly and concluded that restitution might only extend to harm attributable to the crime of conviction. Congress endorsed this view almost immediately with a more explicit statement of §3663’s coverage. It replicated and enlarged that statement when it enacted §3663A six years later.

Sections 3663 and 3663A authorize restitution orders for the benefit of the victims of the crime of conviction, and now expressly define the term “victim” (i.e., “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered”). A victim is also someone harmed by a scheme, conspiracy, or pattern of activity that is an element of the crime of conviction. And, a victim may be someone whom the government and the defendant agree in a plea bargain is entitled to restitution.

Harm is directly caused by the defendant’s offense of conviction when the harm would not have occurred but for that misconduct. Directly caused harm is proximately caused when there is no attenuation between the crime and the harm; when the harm and but-for misconduct are closely, not remotely, related in time and fact. The presence of an intervening cause of the harm may suggest a want of either direct causation, or proximate causation, or both. The presence of an intervening cause will defeat an assertion of direct and proximate harm unless intervening cause is related to or a foreseeable consequence of the offense of conviction. As the Supreme Court explained in the context of one of the specialized restitution statutes,

As a general matter, to say one event proximately caused another is a way of making two separate but related assertions. First, it means the former event caused the latter.... Every event has many causes, however, and only some of them are proximate.... So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result. The idea of proximate cause.... is a flexible concept, that generally refers to the basic requirement that there must be some direct relation between the injury asserted and injurious conduct alleged.... Proximate cause is

often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct. A requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.

The definition of a victim for purposes of restitution under §§3663 and 3663A expands when the crime of conviction has as an element a conspiracy or a scheme or pattern of misconduct. In the case of conspiracy, a defendant may be compelled to make restitution both for the harm caused by his or her own misconduct and for the harm caused by the foreseeable misconduct of his or her coconspirators. As for the scheme and pattern exception, most federal crimes do not list schemes or patterns among their elements, although the mail fraud, wire fraud, and racketeering statutes do. In such cases, restitution may include the losses incurred from a different episode of the scheme than the one mentioned in the indictment. Yet the scheme must be the same; victims entitled to restitution do not include those harmed by an otherwise identical scheme but different in time or place than the crime of conviction. The courts are divided over which statutes qualify as “scheme, conspiracy or pattern” laws. Some say the scheme or pattern must be an element of the crime of conviction; it is not enough that the defendant’s crime involves contrivance or repeated related criminality. Others say it is enough; the statute proscribing the crime of conviction need not use the words “scheme,” or “conspiracy,” or “pattern.”

Sections 3663 and 3663A describe, with somewhat overlapping grants of authority, the circumstances under which representatives and others may stand in the shoes of a victim. A court may also order restitution pursuant to a plea bargain for “victims” who would not otherwise qualify. Although a victim must be a “person” and governmental entities are ordinarily not considered persons, state, local, and federal governmental entities are entitled to restitution orders when they otherwise qualify as victims of a crime under §§3663 and 3663A. On the other hand, although the courts enjoy authority to order restitution paid to family members on behalf of the victims of crime, it is unclear whether the victimization of one member of a family constitutes victimization of its other members sufficient to warrant a restitution order for the benefit of a victim’s family members in their own name.

Crimes

Although §§3663 and 3663A employ the same definition of victim, they do not authorize restitution for the same crimes. The list of crimes for which §3663 permits restitution supplements the list for which §3663A demands restitution. The mandatory restitution of §3663A applies upon conviction for (1) a crime of violence, as defined in §16; (2) an offense against property under 18 U.S.C., or an offense against property under §416(a) of the Controlled Substances Act (21 U.S.C. 856(a), including any offense committed by fraud or deceit; (3) an offense described in §1365 (relating to tampering with consumer products); or (4) an offense under §670 (relating to the theft of medical products).

Section 16 describes a crime of violence as either “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” The controlled substance offense that carries with it a restitution requirement under §3663A (21 U.S.C. 856) consists of maintaining a place where controlled substances are manufactured, stored, or used. The property damage/fraud predicate in §3663A must involve a violation proscribed under title 18 of the *United States Code* rather than an offense found in another title. Yet, the general conspiracy provision in title 18 can provide the necessary basis for a mandatory restitution order when the defendant is convicted of conspiracy to commit property

damage in violation of a federal law found outside of title 18. The product tampering offense consists of tampering with a product or its labeling that affects interstate or foreign commerce or spreading false rumors that such a product is contaminated. Section 670 outlaws the theft of, or unlawful trafficking in, pre-retail medical products.

Three qualifications temper the mandatory restitution requirements facing defendants convicted of the predicate offenses listed in §3663A(c)(1)(A). First, there must be an identifiable victim who has suffered a physical injury or a pecuniary loss. Second, in the case of the property damage/fraud predicates, restitution need not be ordered when the number of victims makes an order impractical. Third, again in the case of property damage/fraud predicates, restitution need not be ordered when the complexity that restitution would introduce into the sentencing process would represent an undue burden.

A few other federal statutes authorize restitution. Numbered among these provisions are: (1) 18 U.S.C. 43 (animal enterprise); (2) 18 U.S.C. 228(d) (restitution child support cases); (3) 18 U.S.C. 1593 (restitution in cases under chapter 77 relating to peonage, slavery, and trafficking in persons); (4) 18 U.S.C. 2248 (restitution in cases under chapter 109A relating to sexual abuse); (5) 18 U.S.C. 2259 (restitution in cases under chapter 110 relating to sexual exploitation of children); (6) 18 U.S.C. 2264 (restitution in cases under chapter 110A relating to domestic violence and stalking); (7) 18 U.S.C. 2323(c) (restitution in copyright infringement cases); (8) 18 U.S.C. 2327 (restitution in telemarketing fraud cases); and (9) 21 U.S.C. 853(q) (restitution in controlled substances cases involving amphetamine and methamphetamine offenses). All but the animal enterprise statute, require it. Most apply the procedures that govern §§3663 and 3663A to a narrower range of crimes but a wider range of losses than §§3663 and 3663A and their attendant enforcement procedures might otherwise permit.

Section 3663 authorizes restitution when the defendant has been convicted of a crime proscribed under title 18 of the *United States Code*. It comes into play when the mandatory restitution statutes do not control. It also authorizes restitution when the defendant is convicted of any of several trafficking offenses under the Controlled Substances Act, or of any of a few air safety prohibitions. In addition, as mentioned earlier, a court may also order restitution consistent with a plea agreement or as a condition of probation or supervised release, even with respect to crimes for which restitution is not authorized under §§3663 or 3663A.

Losses

Restitution is a creature of statute. A court may order reimbursement only for those losses authorized by statute. Sections 3663 and 3663A recognize three categories of reimbursable losses: property losses, losses relating to bodily injuries, and losses relating to participation in the investigation or prosecution of the victimizing offense.

Property Loss or Damage

Sections 3663 and 3663A have essentially identical restitution provisions: both call for the return of the property, if that provides full victim restitution. If not, restitution takes the form of compensatory payments. As a general rule, victims are entitled only to be made whole; unlike the sentencing guidelines which calculate sentence enhancements based on both actual and intended losses, the restitution statutes permit awards only for actual losses. It is often not the fact of a reimbursable loss, but its measure, that challenges the courts. Nevertheless, the types of reimbursable property losses contemplated by §§3663(b)(1) and 3663A(b)(1) include things like the salary of a faithless employee, or the insurance replacement costs of a stolen car, or the losses

visited upon a loan guarantor by a mortgage fraud scheme. Circumstances dictate whether attorneys' fees qualify as reimbursable property losses. The strongest arguments for recovery seem to attend those cases in which the scurrilous litigation is an integral part of the crime of conviction. On the other hand, the courts seem less receptive when restitution is sought as a property loss under either §3663(b)(1) or §3663A(b)(1) in order to compensate a victim for the costs of civil litigation filed against the offender.

Section 3663, unlike its counterpart, permits the court to order those convicted of crime-assisting identity theft or aggravated identity theft to pay for the costs incurred by their victims to remedy the actual or intended harm associated with the offense.

Section 3663(c) also authorizes community restitution in the form of awards apportioned between state victim assistance agencies and state agencies dedicated to the reduction of substance abuse. The court may order restitution in certain drug trafficking cases where there are no identifiable victims, capped by the amount of the fine that the court may impose for commission of the offense. Moreover, at least one court has held that the section authorizes restitution only in those cases where the court actually imposes a fine as well; if the court fails to impose a fine, it may not order community restitution. Section 3663 expressly provides for restitution for the remedial effects of the victims of identity theft committed in relation to other offenses and for state agencies in certain drug trafficking cases if there are no other identifiable victims. Section 3663A has no comparable provision.

The individual restitution sections fall within two categories. One group focuses on restitution for the victims of crimes involving property damage or loss; the other on restitution for the victims of crimes involving personal injury. Among the first group, only the copyright infringement statute adopts by cross reference the mandatory restitution provisions of §3663A. Each of the others follows the same general pattern as §3663A but adds at least one unique feature of its own.

The child support restitution section, 18 U.S.C. 228(d), adopts the procedures of §3663A upon conviction for interstate evasion of child support orders. The amount of restitution that must be awarded is determined by reference to a state court support order or by other governing state law and, as such, may include the interest on overdue support payments and support owed after children have reached their majority.

The peonage restitution section, 18 U.S.C. 1593, uses the common definition of "victim" and affords victims of human trafficking offenses a wide range of compensation that, unlike §§3663 and 3663A, includes the economic benefits derived from the victim's services and a catch-all clause ensuring compensation for predicate crime-related injuries and losses.

The telemarketing fraud restitution statute, 18 U.S.C. 2327, originally enacted two years before the passage of the mandatory restitution provisions of §3663A, once had highly individualistic features. It has since been amended so that its provisions more closely track those of the general restitution provisions for losses caused by predicate crimes.

The methamphetamine statute, 21 U.S.C. 853(q), covers the cleanup cost of closing down illicit amphetamine and methamphetamine production sites. At one time, the section applied only to those convicted of manufacturing offenses and consequently reached convictions for attempted manufacture but not for possession with intent to distribute. The USA PATRIOT Improvement and Reauthorization Act amended the section so that it now authorizes restitution upon conviction for offenses involving possession, possession with intent to distribute, or manufacture of amphetamine and methamphetamine.

The animal enterprise interference section, 18 U.S.C. 43(c), permits a sentencing court to order a defendant convicted of violating its proscriptions to pay restitution for specific kinds of damage

(i.e., the cost of repeating disrupted experiments, the loss of farm income, and the costs of economic disruption).

Personal Injuries

Sections 3663 and 3663A have parallel provisions governing the restitution for personal injuries that permit or, in the case of §3663A, require compensation for medical expenses, lost income, rehabilitation, and funeral expenses in the event the victim is killed.

The medical expenses covered by a restitution order may include those paid on the victim's behalf by a third party, and may include the costs of psychiatric and psychological treatment when the victim has suffered a physical injury. Restitution for lost income extends to both past and future lost income.

Prior to passage of the general mandatory restitution authority in §3663A, Congress authorized restitution for three related small sets of offenses. Those authorizations, found in 18 U.S.C. 2248, 2259 and 2264, require the courts to order restitution following conviction for an offense proscribed in chapters 109A (sexual abuse), 110 (sexual exploitation of children), and 110A (domestic violence and stalking), respectively. Other than their designation of predicate offenses, the sections are identical. They each: (1) insist on restitution of the "full amount of the victim's losses;" (2) define "victims" in much the manner of §§3663 and 3663A; (3) supply a list of losses for which restitution must be ordered; (4) make it clear that neither the defendant's poverty nor victim compensation from other sources absolves the court of its obligation to order restitution; and (5) otherwise adopt the procedural mechanisms used for restitution under Section 3663A.

Unlike §§3663 and 3663A, the three sections on their face do not require bodily injury of the victim as a precondition for the award of the cost of psychiatric treatments. They also have a catch-all clause that has no counterpart in either §§3663 or 3663A. On the other hand, unlike §§3663 and 3663A, they do not authorize payments to third parties to reimburse them for crime-related treatment of a victim.

Cost of Victim Participation in Investigation and Prosecution

Sections 3663 and 3663A cover a victim's lost income, as well as necessary child care expenses, transportation costs, and other expenses associated with his or her participation in the investigation and prosecution of the crime, regardless of whether the resulting injury is to person or to property. A number of courts seem to share the view of that "investigation costs—including attorneys' fees—incurred by private parties as a direct and foreseeable result of the defendant's wrongful conduct may be recoverable" under §§3663(b)(4) or 3663A(b)(4). At least one appellate court, however, has concluded that those sections do not permit "restitution for the costs of an organization's internal investigation, at least when (as here) the internal investigation was neither required nor requested by the criminal investigators or prosecutors."

The sections mention child care, attendance at judicial proceedings, and other matters that bespeak a human victim, but the courts have made it clear that corporations and other legal entities are likewise entitled to restitution under the provisions. Governmental entities may be entitled to restitution awards when they are the victims of a qualifying offense, but not for the costs of investigating and prosecuting the offense.

Awards for investigative and prosecutorial participation have included relocation expenses for threatened victims; compensation for wages lost while the victim assisted in the investigation; and attorneys' fees related to the recovery of the victim of international parental kidnapping.

Procedure

Except to the limited extent otherwise provided in the individual authorization statutes, §3664 supplies the procedure that governs the issuance of restitution orders. Upon conviction of a defendant, the court directs the probation service to investigate and prepare a report identifying each victim of the offense and the extent of their injuries, damages, or losses. Prosecutors are to provide the probation officer with pertinent information. The officer is also to ask victims to detail the extent and specifics of their predicate crime-related losses. The defendant is obliged to give the officer a complete description of his or her financial situation.

The probation officer's report is presented to the court, the defendant, and the prosecutor. The court resolves contested restitution issues by a preponderance of the evidence following a hearing, at which the prosecution bears the burden of establishing the existence and extent of the victim's losses, and the defendant bears the burden on questions regarding his or her finances and the extent to which the defendant has compensated the victim for the losses. The court may conduct a hearing or task the probation officer to secure additional information and resolve disputes.

Section 3664 is precise when it describes how the court must frame the restitution order. The order must envision full compensation for the losses of each victim without regard to the financial circumstances of the defendant. In its calculation of the manner and schedule of payment for each victim, however, the court is to consider the defendant's assets, anticipated future income, and other financial obligations. Compensation may be made in a lump sum, in-kind payments, installments, or any combination of such methods of payment. In-kind payments may take the form of a return of lost property, replacement in-kind or otherwise, or personal services. When the defendant's financial condition precludes any alternative, the order may call for nominal periodic payments. Several courts have emphasized the importance of the court's close attention to the restitution payment schedule by prohibiting sentencing courts from initially ordering that restitution be paid immediately when it is readily apparent that the defendant is unable to do so, thereby effectively leaving the task of establishing a payment schedule to the probation officer or the Bureau of Prisons.

When it sets the restitution owed by the defendant, the court may not take into account the fact that a victim may have been compensated by insurance or any other alternative form of compensation of his or her injury, loss, or damage. The amount of a restitution order may later be reduced to account for compensatory damages for the same loss recovered in a civil action. When the government and the probation officer have been unable to determine the full extent of victim losses within 10 days of sentencing, they are obligated to inform the court. The court is then to set a date, no later than 90 days after sentencing, for the final determination of victim losses. Thereafter, victims have a limited option to present claims for restitution relating to undiscovered losses.

The Supreme Court resolved a circuit split over how these provisions should be applied, particularly in cases where the time lines have not been observed. The Court held in *Dolan* that a sentencing court may determine the extent of a victim's losses and order restitution after the expiration of the statutory 90-day deadline, as long as the defendant was aware beforehand that the court intended to order restitution. Victims may assign their right to receive restitution payments to Crime Victims Fund, but the courts are divided over whether the court may order restitution to be paid to the Crime Victims Fund on its own initiative if the victim refuses to accept it.

Should the court determine that more than one defendant contributed to the victim's loss, it may apportion restitution accordingly or it may make the defendants jointly and severally liable. When defendants are made jointly and severally liable, each is liable for the entire amount, but the victim is entitled to no more than what is required to be made whole, regardless of what portion each of the defendants ultimately contributes. There had been a difference of opinion over whether joint and severable liability may be imposed other than with respect to co-defendants. The Supreme Court has recently provided some clarification as to how courts should deal with restitution when those who are not co-defendants are responsible for a substantial portion of the victim's losses. The defendant in the case viewed child pornography of which the victim was the subject. To hold the defendant liable for all of the victim's losses attributable to production, distribution, and viewing of the material might contravene the proscriptions of the Eighth Amendment's excessive fines clause, the Court suggested. Rather, it held that the defendant's restitution order should be calculated to reflect his relative contribution to the harm caused.

Section 3664(i) declares that when it comes to restitution, the United States is to be served last. The provision is cited most often to confirm that under the appropriate circumstances, the government and its departments and agencies may be considered victims for restitution purposes. When the government is not a victim, the defendant is not entitled to have the restitution award offset by the value of any forfeited property, except to the extent a governmental victim shares in the proceeds of the confiscation.

Section 3664(j) permits a court to order restitution to third parties who, as insurers or otherwise, have assumed some or all of the victim's losses, although in such cases, the victim must be fully compensated first. It also permits a court to reduce an earlier restitution order by any amounts that the victim later receives in the course of related federal or state civil litigation.

The victim, the defendant, or the government may petition to have a restitution order amended to reflect the defendant's changed economic circumstances. The changed economic circumstances envisioned in §3664(k) do not include anticipated future changes or a later, better-informed understanding of the defendant's financial condition at the time of sentence. Nor does the section provide defendants with a mechanism with which to later challenge the legality of their restitution orders.

There are several means to enforce a restitution order. Section 3664(m) declares that restitution orders may be enforced in the manner for the collection of fines or "by all other available and reasonable means." When restitution is a condition of probation or supervised release, failure to make restitution may provide the grounds for revocation. Moreover, a restitution order operates as a lien in the name of the United States on the defendant's property that remains in effect for 20 years. The government may also use garnishment and the other collection mechanisms of the Federal Debt Collection Procedures Act (FDCPA) to enforce a restitution order. A victim may use a restitution order to secure a lien in his own name against the defendant's property to ensure the payment of restitution. In addition, the victims' rights provisions of 18 U.S.C. 3771 entitle a victim to "full and timely restitution as provided in law," a right, enforceable in the face of legally insufficient restitution order through a liberalized form of mandamus in some circuits. In most instances, a victim may also sue the defendant based on the conduct that led to the conviction and the issuance of the restitution order. During the course of such civil litigation, the defendant may be precluded from denying the facts that formed the basis of the conviction.

Section 3664(o) provides that the court's restitution order constitutes a final order notwithstanding the fact it may later be corrected, modified, or appealed under various court rules and statutory provisions. This does not mean that the district court may later reduce a restitution order in the absence of specific authority. Nor does it convey appellate rights upon third parties who claim a right to restitution for expenses necessarily incurred on behalf of a victim.

Abatement

In a criminal law context, the lower federal courts have generally taken the view that the death of a defendant at any time prior to the determination of his or her final direct appeal abates all underlying proceedings; appeals are dismissed as moot, convictions are overturned, indictments are dismissed, and abated convictions cannot be used in related civil litigation against the estate—all as if the defendant was never criminally charged. It might seem from this that a restitution order would abate as well, but there is no consensus among the lower federal courts on the issue.

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